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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/670,781	09/27/2000	Paul C. Daly	011149US1	6751
30031 7590 08/12/2010 PHILIPS INTELLECTUAL PROPERTY & STANDARDS P.O. BOX 3001 BRIARCLIFF MANOR, NY 10510				
EXAMINER WEINSTEIN, STEVEN L				
ART UNIT		PAPER NUMBER		
1782				
MAIL DATE		DELIVERY MODE		
08/12/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* PAUL C. DALY

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Appeal 2009-013271  
Application 09/670,781  
Technology Center 1700

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Before JEFFREY T. SMITH, LINDA M. GAUDETTE, and  
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests reconsideration of our Decision<sup>1</sup> affirming the Examiner's rejections of claims 1-4, 6, 7, 10, 12, 13, 15-17, and 19-39 under 35 U.S.C. § 103(a). (Req.<sup>2</sup> 1.)

Appellant contends the Board erred in its Decision for the following reasons:

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<sup>1</sup> Decision on Appeal ("Dec."), mailed Apr. 28, 2010.

<sup>2</sup> Request for Rehearing, filed Jun. 15, 2010.

1. the Board “[m]isapprehended [t]he [s]ignificance [o]f Lazure’s ‘Unit Dose’ [t]eaching” (Req. 1 (emphasis omitted));
2. the Board “[o]verlooked Appellant’s [p]roof [t]hat [a]n [a]dulATORY [c]ompetitor’s [p]roduct [r]eads [o]n Appellant’s [c]laims” (Req. 4 (emphasis omitted)); and
3. the Board “[o]verlooked Appellant’s [p]roven [n]exus [b]etween [t]he [c]ommercial [s]uccess [o]f SWEET-EASE™ [a]nd SWEET-EASE™’s use of the [c]laimed [i]nvention” (Req. 18 (emphasis omitted)).

We have reconsidered our Decision in light of Appellant’s arguments, but are not convinced of error in our affirmance of the Examiner’s conclusion of obviousness. We separately address each of Appellant’s contentions below.

*Appellant’s contention that the Board misapprehended  
the significance of Lazure’s unit dose teaching*

37 C.F.R. § 41.52(a)(1) states that a “request for rehearing must state with particularity the points believed to have been misapprehended or overlooked by the Board” in its Decision.

In asserting that the Board misapprehended the significance of Lazure’s unit dose teaching, Appellant essentially raises the same arguments presented in the Appeal Brief<sup>3</sup>. (*Compare* App. Br. 9 with Req. 2-4.) These arguments were thoroughly considered, but not deemed persuasive for the reasons explained in the Decision (*see* Dec. 7-9). Appellant’s attention is directed to our discussion of the Examiner’s findings as to the knowledge and skill of the ordinary artisan and our comments on Appellant’s failure to address these findings, which findings were relied on by the Examiner *in*

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<sup>3</sup> Appeal Brief (“App. Br.”), filed Mar. 20, 2009.

*combination with Lazure for a teaching or suggestion of the claimed unit dose containers (Dec. para. bridging 8-9).*

*Appellant's contention that the Board overlooked Appellant's proof that an adulatory competitor's product reads on Appellant's claims*

37 C.F.R. § 41.52(a)(1) states that “[a]rguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing.”

According to Appellant, the Board erred in “disregard[ing] Hawaii Medical’s adulation for the claimed invention on the ground that ‘Appellant has not directed us to any evidence which establishes that Appellant’s claims read on the advertised product.’” (Req. 4 (quoting Dec. 14).) In an effort to correct deficiencies in the Appeal and Reply Briefs<sup>4</sup>, Appellant now submits a “claim chart confirming that the cited evidence of record ‘establishes that Appellant’s claims read on the advertised product.’” (Req. 5 (quoting Dec. 14).)

We decline to consider this claim chart since Appellant has not explained, nor do we see any reason, why such chart was not previously included in the Appeal and/or Reply Briefs.

We additionally note that we do not agree with Appellant’s view of the claim chart as sufficient to demonstrate that the TootSweet Advertisement is persuasive adulation evidence. (*See* Req. para. bridging 17-18.) Appellant is directed to the paragraph bridging pages 14-15 of the Decision which identifies additional reasons why the TootSweet Advertisement was not found to be persuasive “adulation evidence,” which reasons would not be addressed by Appellant’s claim chart.

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<sup>4</sup> I.e., the Reply Brief filed Jun. 22, 2009.

*Appellant's contention that the Board overlooked Appellant's proven nexus between the commercial success of SWEET-EASE™ and SWEET-EASE™'s use of the claimed invention*

In support of this contention, Appellant again merely summarizes the same arguments presented in the Appeal Brief, without particularly identifying “the points believed to have been misapprehended or overlooked by the Board” in its Decision, as required by 37 C.F.R. § 41.52(a)(1). (*Compare* App. Br. 15-19 *with* Req. 18-19.) Appellant’s arguments and evidence were thoroughly considered, but not deemed persuasive for the reasons explained in the Decision (*see* Dec. 11-14).

In conclusion, based on the foregoing, we have granted Appellant’s request to the extent that we have reconsidered our Decision, but we deny Appellant’s request to make any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

DENIED

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